RECENT DECISIONS.

BANKRUPTCY—ACT OF BANKRUPTCY—CONCEALMENT. An absconding debtor who takes with him property not exempt from his creditors is *held* guilty of a concealment and of a removal of property with intent to defraud, creditors. *In re Filer*, 5 Am. B. R. 332 (South. Dist. N. Y. 1900).

It is clear that the debtor has committed an act of bankruptcy within Section 3, clause 1. But it may be material to distinguish between a concealment and a removal or transfer of property. The former is a continuing act, and affords ground for an involuntary petition so long as the concealment continues; the latter is generally a single act, which to afford such ground, must have been done within four months prior to the filing of the petition. This distinction is well taken by GROSSCUP, J., in *Citizens' Bank of Salem* v. *DePauw Co.*, 5 Am. B. R. 345 (C. C. A., 7th Circ. 1901). Concealment may of course be effected by such a fraudulent transfer or removal as would only cover or mask the debtor's title or interest, in which case there would not be a real divestiture of title or interest of the debtor.

BANKRUPTCY—EXEMPTIONS. The bankruptcy court is *held* to have no power under the Act to protect or to enforce the rights of creditors against the bankrupt's exempt property, although the bankrupt has waived his exemptions as regards particular creditors. *Woodruff* v. *Cheeves*, 5 Am. B. R. 296 (C. C. A., 5th Circ. 1901). See NOTES.

BILLS AND NOTES—VARYING OR CONTRADICTING TERMS—PAROL EVIDENCE. Where the defendant, the maker of a promissory note, had entered into a prior parol agreement with the plaintiff, payee, "that in no event should he ever be called upon, to pay in money, any part of the note sued upon." *Held*, that this parol agreement could not be given in evidence, to vary or contradict the terms of the note. *Garneau* v. *Cohn*, 85 N. W. 531 (Neb. March, 1901).

The decision reached in this case is strictly in accord with the rule prohibiting the admission of parol agreements to vary or contradict the terms of a written instrument. *Gerner* v. *Church*, 43 Neb., 690 (1895); *Quinn* v. *Moss*, 45 Neb. 614 (1895), etc. But it would seem that the note in question was, as between the parties, to serve only as a memorandum showing the amount of indebtedness, and hence, this evidence formed an exception to the general rule. For it is generally held that where the defendant wished to show that the contract sued upon is not the one into which he entered, *i. e.*, that there is, in effect, no contract, such evidence is admissible. *Pike* v. *Street*, Moody & Malkin, 226 (1828); *Watkins* v. *Bowers*, 119 Mass. 383 (1876); *Norman* v. *Waite*, 30 Neb. 302 (1890); *Witherow* v. *Slayback*, 158 N. Y. 649 (1899). But some jurisdictions have adopted a contrary view, adhering strictly to the parol evidence rule. *Mason* v. *Burton*, 54 Ill. 349 (1870); *Holton* v. *McCormick*, 45 Ind. 411 (1873); *McLanagan* v. *Hines*, 2 Strobh. 122 (S. Ca. 1847).

CONFLICT OF LAWS—TORTS—TELEGRAMS—MENTAL ANGUISH. The defendant, having agreed with the plaintiff in Arkansas to transmit and deliver a telegram to a point within that State, failed to do so and thereby caused the plaintiff mental anguish. By the laws of Arkansas no damages are allowed in an action for mental anguish alone. The plaintiff sued in Texas, where such damages are usually allowed. *Held*, plaintiff could not recover. *Thomas* v. *West. U. Tel. Co.*, 61 S. W. 501 (Tex., Feb., 1901).

This decision is not to be taken as a modification of the law of Texas, that its courts allow damages for mental anguish alone when such anguish is caused unlawfully within its own territory, but as a recognition of the doctrine that in some instances damages pertain primarily to one's right, not to one's remedy.

If the plaintiff had any cause of action in tort in Arkansas (a point which is not made plain in the opinion), the decision may be questioned, *Wooden* v. *Railroad Co.*, 126 N. Y. 10 (1891); but it would appear both sound in principle and supported by the weight of authority. *Ry. Co.* v. *Jackson*, 89 Tex. 107 (1896); *Railroad Co.* v. *Babcock*, 154 U. S. 190 (1893). If the plaintiff had no cause of action in Arkansas, the decision is undoubtedly correct. *La Forest* v. *Tolman*, 117 Mass. 109 (1875).

CONSTITUTIONAL LAW—PUBLIC CONTRACTS. One Treat performed work for the City of New York under a contract containing a clause following the statute (Laws 1897, C. 415) which provided that the City should be freed from all liability under the contract, if the contractor in the course of performance should use any stone dressed outside of the State. *Held*, the statute was unconstitutional and the clause inoperative. *People ex rel. Treat* v. *Coler*, 59 N. E. 776 (N. Y. March, 1901).

The question whether a statute regulating in detail the contracts of a city for proper public works is unconstitutional was elaborately discussed in the case of *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1; which is followed in this decision. See also 1 COLUMBIA LAW REVIEW, 315. The present Court further holds that the "Dressed Stone" Statute is unconstitutional as usurping the right of Congress to regulate interstate commerce. Admitting this, it was proper to take out of the contract a clause inserted in compliance with the statute. *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211. But the point is a close one and the principal case, although undoubtedly the present law, is chiefly interesting as showing the attitude of the New York Court of Appeals toward certain recent socialistic tendencies of the Legislature.

CONSTITUTIONAL LAW—POLICE POWER—LICENSES. *Held*, a statute requiring the owners of all grain elevators, where grain is bought and weighed, to procure a license and pay a fee does not contravene the Fourteenth Amendment, being an exercise of the police power. *Cargill Co.* v. *Minnesota*, 21 Sup. Ct. Rep. 423 (March, 1901).

While it would seem that the decision cannot be questioned, the case is nevertheless interesting in view of the fact that the plaintiff neither stored nor shipped grain for other persons. The argument of the Court in *Munn* v. *Illinois*, 94 U. S. 113 (1876), where the right to regulate elevator storage rates was involved, does not therefore apply. The ground of the decision is that an elevator is "a sort of public market," even though used for storing only the owner's grain, and therefore it is within the police power of the State to require a license for purposes of regulation, and to protect the public against imposition and fraud. The case illustrates what is really a working principle of the Court that when a statute is directly connected with the social order of the State, it will be upheld unless it plainly violates the Federal Constitution. *Plumley* v. *Mass.*, 155 U. S. 461 (1894).

CONTRACTS—ACCOUNT STATED. Plaintiff was the receiver of a corporation of which defendant had been president. The evidence showed that the bookkeeper under the defendant's direction had kept a personal account with the defendant; that the defendant in the petition for dissolution included this item as an asset of the corporation. The trial Court held as a matter of law that no account was stated. *Held*, error. *Spellman* v. *Muehlfeld*, 59 N. E. 81 (N. Y., March 1901).

The holding of the lower courts was properly reversed. There must be a mutual examination of claims and a mutual agreement to an account settled, but these may be implied. *Lockwood* v. *Thorne*, 18 N. Y. 285 (1858). Whether an account presented in evidence is an account stated is a question for the jury. *Davis* v. *Tiernan*, 3 Miss. 786 (1838); *Robbins* v.

Downey, 16 N. Y. Supp. 205 (1891); *Nostrand* v. *Ditmis*, 28 N. E. 27 (N. Y. 1891); *Rosenfeld* v. *Fortier*, 94 Mich. 29 (1892).

CONTRACTS—CONDITIONS PRECEDENT—NON-PERFORMANCE—DEFENDANT IN DEFAULT. Where defendant, an ice manufacturer, contracted to furnish plaintiff with ice from his surplus product, so as not to interfere with other prior agreements, *held*, lack of surplus due to defendant's failure to put his machines in order was no defense to an action for non-delivery. *Richmond Ice Co.* v. *Crystal Ice Co.*, 38 S. E. 141 (Va., March, 1901).

It might be contended here that defendant never parted with his volition, that he was under no obligation to manufacture any ice, that there was no contract. *Cf. Taylor* v. *Brewer*, 1 Maule & Selwyn 290 (K. B. 1813). The decision proceeds, however, upon the theory that the parties intended a contract, and that defendant's factory was to run and produce ice. Even in this view, the existence of a surplus was a condition precedent to defendant's liability. It is universally acknowledged that where non-performance of a condition precedent is due to defendant's act or default he shall not be relieved from liability. *Williams* v. *Lloyd*, W. Jones, 179 (K. B. 1664); *Camp* v. *Barker*, 21 Vt. 469 (1849).

In *Navigation Co.* v. *Wilcox*, 7 Jones L. 181 (N. C. 1860), and in *Jones* v. *Walker*, 13 B. More, 163 (Ky. 1852), defendant's liability depended upon a decision favorable to him in certain suits then pending. He compromised the suits. The courts in each case held plaintiff might recover without showing performance of the condition. These two decisions would seem to cover the principal case.

CONTRACTS—CONSIDERATION—BENEFICIARIES. Where defendant promised A to deliver lumber to plaintiff, who later paid A $250 for the order containing the promise, *held*, the payment by plaintiff to A was a good consideration for defendant's promise. *Elmer* v. *Loper*, 48 Atl, 550 (N. J., March, 1901).

Certainly a detriment suffered by the *promisee*, if at the *request* of the promisor, is a good consideration. But the authorities do not support the doctrine here laid down, that a detriment suffered by a beneficiary, *i. e.*, a third person, without request by the promisor, and without his knowledge, is a good consideration. Chitty on Contracts, 10th Am. Ed., p. 27; 1 Parsons on Contracts, 7th Ed., p. 431; *Gordon* v. *Dalby*, 30 Ia. 223 (1870); *Barnes* v. *Perine*, 9 Barb. 202 (N. Y. 1850); *Kempton* v. *Coffin*, 12 Pick. 129 (Mass. 1831).

Walker v. *Sherman*, 11 Met. 170 (Mass. 1846), cited by the Court in support of its view, is plainly distinguishable. In that case, it is true, plaintiff sued defendant on his acceptance of an order. But at the time of the acceptance the three parties were together, and in consideration of plaintiff's forbearance to sue the drawer on an existing debt, defendant agreed to deliver the goods.

It would seem that here there was a good bilateral contract between defendant and the promisee A, and in that view of the case plaintiff might have recovered, as being the beneficiary. 1 Parsons on Contracts, page 469.

CONTRACTS—CONSIDERATION. A debtor upon a final judgment, recovered by an infant, instituted further suits to determine the rights of various claimants of the judgment. *Held*, in an action to set aside a release of the judgment given by the infant's curator for less than the amount due on the judgment, the discontinuance of those suits was no consideration for the release. *Winter* v. *Kansas City Ry. Co.*, 61 S. W. 606 (Mo. June, 1900).

It would be difficult to support this case upon legal principles. While it is true that payment of part of a liquidated sum is no consideration for a release of the whole [*Jaffray* v. *Davis*, 124 N. Y. 164 (1891)], it is also unquestionable that the discontinuance of suits instituted in good faith is a consideration for such a release. *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449 (1870); *Grandin* v. *Grandin*, 49 N. J. L. 508 (1887); *Good Fellows* v. *Campbell*, 17 R. I. 402 (1891). The defendant in the

principal case had instituted the proceedings in good faith, and there seems to be no valid reason for the decision that the discontinuance of such suits is no consideration.

CORPORATIONS—ISSUING STOCK BELOW PAR. Defendant directors proposed to issue $45,000,000 stock to M. Guggenheim's Sons in exchange for cash and property worth not more than $24,000,000 exclusive of goodwill. *Held*, the issue could be enjoined at the instance of a minority stockholder, as the New Jersey statute allows stock to be issued only to the amount of the value of the property purchased. *Donald* v. *American Smelting & Refining Co.* (N. J. Eq. 1901). SEE NOTES, p. 402.

CONSTITUTIONAL LAW—LEGISLATIVE CONTROL OVER CONTRACTS—LABOR LAW. The labor law (L. 1897, c. 415; am'd L. 1899, cc. 192, 567), provided that all contracts to perform public work should contain a stipulation that the contractor or sub-contractor should pay his laborers the prevailing rate of wages in the locality where the work was done, or else forfeit all right to recover any compensation for work performed. *Held*, the statute was unconstitutional, (*a*) under Art. 8, § 11, of the State constitution, which provided that no city, town, etc., pay out money except for a city purpose; (*b*) as imposing a forfeiture on the contractor whenever he should exercise his right of contracting freely with laborers, thus depriving him of his liberty (State Const., Art. I., secs. 1 and 6; U. S. Const., Amdt. XIV., sec. 1). *People ex rel. Rodgers* v. *Coler*, 59 N. E. 716 (N. Y.), Feb. 26, 1901. SEE NOTES, p. 315.

DOMESTIC RELATIONS—DIVORCE—CONFLICT OF LAWS—VALIDITY OF FOREIGN JUDGMENTS—SUBSTITUTED SERVICE OF PROCESS. Plaintiff sued for divorce in the state where she resided. Her husband appeared and pleaded a decree of divorce obtained by him in another state by substituted service of process. The evidence showed that the husband had never acquired a *bona fide* domicile in the State in which his judgment was rendered, and that the wife had never lived there. *Held*, the decree is void, the court granting it having been without jurisdiction. *Bell* v. *Bell*, 157 N. Y. 719 (1899), *affirmed on appeal; Streitwolf* v. *Streitwolf*, 58 N. J. Eq. 563 (1899), *affirmed on appeal:* U. S. Supreme Court, April 15, 1901. SEE NOTES, p. 396.

DOMESTIC RELATIONS—DIVORCE—CONFLICT OF LAWS. Plaintiff sued in New York for a limited divorce, alleging cruelty on the part of her husband. The defendant, a resident of Kentucky, appeared and set up a decree of absolute divorce procured in that state by constructive service, on the ground of desertion. The court found that the wife had been compelled to leave her husband because of his abusive treatment, and had acquired in good faith a separate domicile in New York. *Held*, the Kentucky decree is void as to the wife for want of jurisdiction, since she had not appeared in the suit and had not been personally served with process. *Atherton* v. *Atherton*, 155 N. Y. 129 (1898), *reversed on appeal;* U. S. Supreme Court, April 15, 1901. N. Y. Law Journal, Apr. 17, 1901. SEE NOTES, p. 396.

DOMESTIC RELATIONS—INFANCY—FRAUDULENT MISREPRESENTATION AS TO AGE. Plaintiff sued to recover possession of land purchased by his grantor from an infant, relying on the latter's affidavit that he was of full age. On attaining majority, the vendor claimed the right to disaffirm and gave defendant a deed for the property. *Held*, the defendant has no title, the infant having been estopped by his fraud to disaffirm his first conveyance. *Damron* v. *Commonwealth*, 61 S. W. 459 (Ky., Mar. 1901).

This ruling by a court of law is an unusual one, it being generally held that an infant's right to avoid his contracts cannot be taken away because of any act on his part while still under age. On principle, the defrauded adult should be allowed to recover in an action for deceit, but in many jurisdictions such an action cannot be maintained, on the ground that, in effect, it would amount to allowing an enforcement of the con-

tract. Courts of equity have sometimes invoked the doctrine of estoppel. *Overton* v. *Bannister*, 3 Hare 503 (1844). In the principal case, the court based its decision on the case of *Schmitheimer* v. *Eiseman*, 7 Bush 298 (Ky., 1870), which was a suit in equity to set aside a deed. In Texas the theory of estoppel is applied at law in these cases. *Kilgore* v. *Jordan*, 17 Texas 341 (1856). Under the civil law an infant is bound absolutely by his fraudulent contracts, and in Iowa this rule has been adopted by statute. *Prouty* v. *Edgar*, 6 Iowa 353 (1858).

EQUITY—PURPRESTURE—MAY BE ABATED, THOUGH NOT A NUISANCE. Where defendant, not a riparian owner, built a boat house and pier in the shallow waters of a navigable lake, in no way obstructing navigation, *held*, such structures are illegal as invasions of the public domain and should be abated. *Attorney-General* v. *Smith*, 85 N. W. 512 (Wis., March, 1901).

A purpresture is any encroachment on public rights, not necessarily a nuisance (Gould on Waters, 3 ed., § 21). Where it amounts to a nuisance, public or private, the jurisdiction of equity has never been questioned, but a doubt seems to have arisen as to the abatement of a purpresture, which does not amount to a nuisance. In California, the court has held that equity has no jurisdiction and that the parties must proceed at law, *People* v. *Davidson*, 30 Cal. 379 (1866), but the general view is *contra*, holding that courts of equity have such jurisdiction, chiefly because of the inadequacy of a suit at law. *People* v. *Vanderbilt*, 28 N. Y. 396 (1863); *People* v. *Staten Island Ferry Co.*, 68 N. Y. 71 (1877); *Revell* v. *People*, 177 Ill. 468 (1899).

INSURANCE—FORFEITURE—WAIVER. An adjuster, expressly stating that he did not waive breach of condition of occupancy, required the insured to make out a list of destroyed property and left without claiming forfeiture. The insured then went to expense in preparing proofs of loss. *Held*, the forfeiture was waived. *Germania-American Ins. Co.* v. *Evants*, 61 S. W. 536 (Civ. App., Texas, 1901).

In *Phœnix Ass. Co.* v. *M'f'g Co.*, 49 S. W. 271 (1898), a policy containing the stipulation that "the company shall not be held to have waived * * * any forfeiture thereof by any requirement * * * relating to appraisal, etc., was held to give a right of election to the company, and its acts with full knowledge of breach of condition would bind it to its position. The principal case logically follows,

In New York after *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410 (1880), the above stipulation was generally made a part of the policy and was incorporated in the standard policy. It is doubtful if any change was made, however (see *Gibson El. Co.* v. *Liverpool & L. & G. Ins. Co.*, 159 N. Y. 418 (1899), and cases discussed). If an appraisal is proper in any event, the insurer, though requesting it, does not assume a position inconsistent with its right to take advantage of a breach, *Kiernan* v. *Dutchess County Mut. Ins. Co.*, 150 N. Y. 190 (1896), and mere inaction of insurer is an insufficient basis of a waiver, *Gibson El. Co.* v. *Liverpool & L. & G. Ins. Co.*, *supra*. The prophecy in § 163, Richards, Insurance, seems wrong.

INSURANCE—PROOF OF LOSS—MAILING. Under a condition in policy requiring statement of proofs of loss to be "rendered" within sixty days, insured mailed proofs on the sixtieth day, which were received after expiration of conditional time. *Held* (3 dissenting), that depositing of proofs in mail was not compliance with provisions of policy. *Peabody* v. *Satterlee et al.*, 59 N. E. 818 (N. Y. 1901).

In the words "render a statement to attorneys," the Court finds a clear intention to furnish personally to the defendants proofs of loss. The decision seems correct. On a like state of facts in *Hodgkins* v. *Mut. Ins. Co.*, 34 Barb. 213 (1861), it was held that under a condition to "deliver in a particular account," there must be actual delivery. The case was reversed in 41 N. Y. 620 (1869), whether on this point or not is not evident. A condition to "make a representation to the company" has been given a like

construction. *Plath* v. *Ins. Co.*, 23 Minn. 479 (1877). In *Susquehanna Mut. Ins. Co.* v. *Toy Co.*, 97 Pa. 424 (1881), is found an intention of actual delivery of proofs of loss with a *dictum* that notice of loss merely requires diligence. *Cf.* Woods, Ins. (2d Ed.) 942–3. *Badger* v. *Glens Falls Ins. Co.*, 49 Wis. 389 (1889), has a *dictum* opposed to principal case. Such notice is clearly distinguishable from notice as an implied condition for the convenience of the party to be bound. Langdell, Contracts, § 6.

QUASI CONTRACTS—RECOVERY OF MONEY PAID IN MISTAKE OF FACT—CERTIFICATION OF DRAFT—NEGLIGENCE. Where the plaintiff certified a draft which had been raised, although at the time a letter notifying it of the amount was on the bookkeeper's desk, and the defendant, relying on the certification, paid over the money, *held*, the plaintiff could not recover because of its negligent act on which defendant had relied. *Continental Bank of N. Y.* v. *Tradesmen's Bank of N. Y.*, 69 N. Y. Supp. 82 (Sup. Ct. Ap. Div., March, 1901).

Generally, money paid in mistake of fact may be recovered, even though plaintiff's mistake was due to negligence, *Kelly* v. *Solari*, 9 Meeson & Welsby 54 (1841); *Appleton Bank* v. *McGilvray*, 4 Gray 518 (Mass., 1855). And the rule seems to apply although the defendant has relied on plaintiff's negligent act. *White* v. *Continental Bank*, 64 N. Y. 317 (1876). By certifying the check, the bank admitted and guaranteed only that the drawer had funds in the bank and that his signature was genuine. *Marine Bank* v. *Nat. City Bank*, 59 N. Y. 67 (1874); N. Y. Negotiable Instruments Law, § 323 (General Laws of 1897, Chap. 612). The principal case was decided on the analogy of *Clews* v. *Bank*, 114 N. Y. 70 (1889), where the draft was raised after certification and inquiry was made of the certifying bank before it was honored. The court held that the bank could not recover, because it knew the amount of the draft and was culpably negligent in not referring to its register. The facts in the principal case are distinguishable. The draft was raised before certification and no further inquiry, the basis for the decision of *Clews* v. *Bank* (*supra*), was made; nor was there any order to stop payment of the draft, another point on which the Clews case was decided.

REAL PROPERTY—ADVERSE POSSESSION—SUCCESSIVE OCCUPANTS—TACKING. Where the successive grantees of a lot have occupied a strip of plaintiff's adjoining land for more than twenty years in the aggregate, though none of the deeds included said strip, *held*, the right of the owner of the record title was barred by the statute of limitations. *Wishart* v. *McKnight*, 59 N. E. 1028 (Mass., April, 1901).

This case would seem to establish a new rule in Massachusetts, departing from the doctrine of *Sawyer* v. *Kendall*, 10 Cush. 241 (Mass., 1852), though the court purports only to "limit" that case to the point decided. In that case the court held that "several consecutive" adverse "possessions, cannot be tacked so as to make a continuity of disseisin of sufficient length of time to bar the true owner's right of entry. * * * There must have been a privity of estate between the successive disseisors; * * * some such relation as that of ancestor and heir, grantor and grantee, devisor and devisee." This was not *dictum*. It is clear that in the principal case there is no such privity. Nor is the fact that in *Sawyer* v. *Kendall*, the second disseisor was the wife of the first, or the kind of act relied on to prove the disseisin, granted that there was one, ground of distinction, though the court seems to think otherwise. If in the latter case the seisin descended to the heir or that of the true owner revived, how in the principal case did it pass to the subsequent grantees?

Further, it does not appear that the case of *Overfield* v. *Christie*, 7 Serg. & R. 173 (Pa. 1821), on which the court relies as showing that there was no authority on which to base *Sawyer* v. *Kendall* decides anything, save that a claim to land maintained for less than the statutory period is transferable by *deed* or *will*.

There are authorities in accord with the principal case. *Fannon* v. *Wilcox*, 3 Day 269 (Conn. 1808), [limited somewhat by *Smith* v. *Chapin*,

31 Conn. 530 (1863)]; *Shannon* v. *Kinny*, 1 Marsh. 4 (Ky., 1817), [though the opposite result was reached in *Winn* v. *Wilbite*, 5 Marsh. N. S. (Ky., 1834)]; *McCoy* v. *Dickenson College*, 5 Serg; & Rawle 254 (Pa., 1819); *McNeeley* v. *Langam*, 22 Ohio St. 32 (1871).

The New York rule, and the general doctrine is that of *Sawyer* v. *Kendall*. *Smith* v. *Reich*, 80 Hun, 287 (N. Y., 1894); Angell on Limitations, 6th ed., §§ 413, 414; Tyler on Ejectment and Adverse Enjoyment, p. 914; *Riggs* v. *Fuller*, 54 Ala. 141 (1875).

REAL PROPERTY—CONTRACT OF SALE—INFANCY—ADVERSE POSSESSION. An infant made a parol sale of land, gave possession and received the purchase price; he also signed a bond to make a deed when he came of age. *Held*, the vendee's possession was adverse, being that of a vendee under an executed contract of sale. *Ogle* v. *Hignet*, 61 S. W. 596 (Mo., March, 1901).

The use of the term executed contract here is unfortunate, for the reason that with respect to the vendor's promise, the contract was in fact unexecuted. In saying that as the vendee had fully performed his part of the contract the contract had become executed and that, therefore, he was an adverse possessor, the court reaches a correct result; but its language is ambiguous. If a contract is said to be unexecuted, one may be misled, as the plaintiff was here, in supposing that it is wholly unexecuted, whereas in fact it may be wholly performed on one side.

Had the court said the plaintiff could not recover because the vendee was in possession under a unilateral contract, no misunderstanding could arise; for it is only when a vendee is in possession under a bilateral contract that he cannot be said to hold adversely. *Adair* v. *Adair*, 78 Mo. 630 (1883). At least without some unequivocal and positive action to indicate such a purpose. *Hannibal & St. Jo. R. Co.* v. *Miller*, 115 Mo. 158 (1893).

REAL PROPERTY—COVENANTS AGAINST INCUMBRANCES—REMOTE GRANTEE. A deed contained a covenant against incumbrances. The land at the time was subject to a local assessment, and thereafter was conveyed subject to the assessment. *Held*, such conveyance broke the continuity of the of the covenant and a subsequent grantee under a deed containing the covenant against incumbrances cannot recover on it as against the original grantor. *Geiszler* v. *DeGraaf et al.*, 59 N. E. 993 (N. Y., March, 1901).

The grantee of land conveyed subject to an assessment or other incumbrance is presumed to deduct the amount of the assessment from the purchase-price. Therefore he and his grantees have no right of action on any covenant against incumbrances in a deed by a previous grantor. *Vrooman* v. *Turner*, 69 N. Y. 280 (1877).

The present case is interesting, chiefly because the court took occasion to review previous conflicting decisions and declare that "the covenant against incumbrances attaches to and runs with the land, and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered." This ruling, though strictly only a *dictum*, will probably settle that question in New York. It is in line with the general tendency of decisions and enactments. The opposite view which prevailed at common law was based on the non-assignability of choses in action. Since choses in action are now assignable in New York, this doctrine should not survive the reason on which it was founded, and there are decisions in the lower court declaring that it does not. *Coleman* v. *Bresnahan*, 54 Hun, 619 (1889); *Clarke* v. *Priest*, 47 N. Y. Supp. 489 (Sup. Ct., App. Div. 1889).

REAL PROPERTY—DRAINAGE OF OIL LANDS—DAMAGES. Where A leased two adjoining tracts of oil land from different parties, B and C, agreeing to pay a royalty on all the oil produced, and then sank a well on C's land only, intending to drain and in fact draining the oil from B's land. *Held*, in equity, B is not entitled to the royalties on all the oil produced, on the theory of confusion of goods, but only on the proportion of oil, to

the whole amount produced, which the area of his land so drained bears to the land drained in the other tract. *Kleppner* v *Lemon*, 48 Atl. 483 (Sup. Ct. Pa., March 25, 1901).

Cases relating to oil and natural gas necessarily involve difficult and uncertain points, for although both are minerals, because of their peculiar attributes, as the subject of property, they differ from other minerals, and the term "minerals *ferœ naturæ*," used by MITCHELL, J., in *Westmoreland Co.* v. *De Witt*, 130 Pa. 235 (1890), illustrates their nature. Thus, until the owner of the land has actually reduced the oil into his possession he has no exclusive property right in it, and if an adjoining proprietor by sinking a well in his own land draws off the oil, the owner of the drained land has no remedy. *Achison* v. *Stevenson*, 146 Pa. 239 (1891); *Brown* v. *Spilman*, 155 U. S. 665 (1895). This result is in accord with the doctrine as to percolating water, *Acton* v. *Blundell*, 12 M. and W. 324 (1843), and has been followed in Vermont, even in the case of malicious interception. *Chatfield* v. *Wilson*, 28 Vt. 49 (1855). In view of this doctrine, where oil lands are leased in consideration of a royalty, the law implies a covenant on the part of the lessee to work the lands properly and with due diligence so that the lessor should not sustain loss by the operations of adjoining proprietors. *Brown* v. *Vandergrift*, 80 Pa. 142 (1875); *Koch's Appeal*, 93 Pa. 434 (1880). It seems from an earlier report, *Kleppner* v. *Lemon*, 176 Pa. 502 (Sup. Ct., 1896), that the lessee (A), in the principal case had forfeited his lease; but it is not shown in the present report whether the lessor is trying to obtain damages for the breach of the implied covenant to work the lands properly and with due diligence, or is attempting to get satisfaction for the oil willfully drained from his land. If the lessor's action is on the implied covenant, the measure of damages ought to be determined in a more accurate way, for the relative areas of the two tracts show nothing as to the amount of oil lying under the surface. In a question of so uncertain a nature, the measure of damages laid down in *Bradford Oil Co.* v. *Blair*, 113 Pa. 83 (1886) seems preferable. The court there decreed that a master should ascertain how much more oil the plaintiff ought to receive, over and above what he had received, deducting from this the cost of producing what ought to have been produced. So here, an estimate of the amount of oil lying under the lessor's land should have been made and the royalties allowed on that quantity only. But if the lessor is attempting to get satisfaction for the oil drained from his land, it seems doubtful whether he has any right to recover. For the cases of *Achison* v. *Stevenson* and *Brown* v. *Spilman* (*supra*), hold that the owner of the soil has no such property right in oil, before it is reduced to possession as to be able to bring trover for it, if it is drained off through the land of another. As the action was in equity, the court might, however, have given damages for the fraud practiced on the plaintiff. (See Law of Mines and Mining in the U. S., Barringer & Adams, ed. 1897.)

REAL PROPERTY—HIGHWAYS—NEW USER. Judgment was sought declaring unconstitutional an act authorizing side paths on roads, for the use of bicycles. Refused. *Ryan* v. *Preston*, 69 N. Y. Supp. 100 (March, 1901).

This is an application of a recognized principle to new facts. Mr. Justice MITCHELL states the doctrine clearly in *Cater* v. *N. W. Tel. Exch.*, 63 N. W. 111 (Minn. 1895), namely that methods though not within the contemplation of the original dedication, if within the general purpose of that dedication, impose no additional burden. This is the principle of *Palmer* v. *The Larchmont Light Co.*, 158 N. Y. 231 (1899) which does not conflict with *Eels* v. *The Am. Tel. Co.*, 143 N. Y. 133 (1894).

The use in the principal case is not comparable to a use by a railroad company for its road bed.

REAL PROPERTY—LANDLORD AND TENANT. Where a tenant sub-let the premises with the lessor's permission, and, owing to the sub-lessee's refusal to quit, the tenant was unable to surrender possession at the expiration of the lease, *held* the landlord may hold the tenant for another

year's rent, because the failure to deliver up the premises was the tenant's fault. *Sullivan* v. *G. Ringler & Co.*, 69 N. Y. Sup. 38 (March, 1901).

It is well settled in New York that a tenant who holds over may be liable either as a trespasser or tenant for another year. *Schuyler* v. *Smith*, 51 N. Y. 313 (1873). The rule has been strictly applied, no exception being made in case of an involuntary holding over. *Haynes* v. *Aldrich*, 133 N. Y. 287 (1892), where it was held that the presence of a sick boarder in the house who could not be removed with safety was no excuse. In *Herten* v. *Mullen*, 159 N. Y. 28 (1899), however, the rule was relaxed, where it was held that involuntary holding over, if caused by act of God or inevitable accident, will not render the tenant liable for another year's rent. Obviously, the principal case did not fall within this exception.

SALES—UNPAID VENDOR—PASSING OF TITLE—NOTICE TO SUB-VENDEE. Contractors agreed to build a house for the defendant and bought materials from the plaintiff. When the house was partly completed and some of the lumber still unused lay on the property, the building contract was rescinded by mutual agreement, the defendant buying of the contractor this building material. *Held*, the plaintiff, the materialman, having given notice to the defendant that he was unpaid, could recover for the materials so used. *Rosenbaum* v. *Carlisle*, 29 So. 517 (Miss., March, 1901).

It is difficult to see how the notice given could have such effect. The fact that the contractors had not paid for the material did not necessarily prevent title passing. Benjamin on Sales, page 299, and cases there cited. By all the facts that appear the lumber was sold and delivered, and the purchase-price is being sued for. The contractors, then having title, sold to the defendants. The plaintiff had his action against the contractors for goods sold and delivered, but certainly not against the present defendant. Though not the better doctrine, there is authority for the view that in a "cash" sale, title does not pass even by delivery unless the price is paid. *National Bank* v. *Chicago, Burlington and N. Ry. Co.* 44 Minn., 224 (1890); *Empire State Founding Co.* v. *Grant*, 114 N. Y. 40 (1889).

Nothing is shown as to the terms of this sale. If the notice given was for the purpose of preventing the passing of title, this suit against the defendant should have been in replevin or for conversion.

STATUTES — DOCUMENTARY EVIDENCE — REVENUE STAMPS. *Held*, the United States Internal Revenue law of 1898 forbidding the use of certain documents as evidence in any court unless bearing revenue stamps, affects their use in the Federal courts only. *Watson* v. *Mirike*, 61 S. W. 538 (Tex., Feb , 1901).

The question here presented has not yet been answered by the Supreme Court of the United States. Until it has been, it must remain an open one. It is worthy of note, however, that the holding above agrees with the holdings of nearly all the States upon the somewhat similar internal revenue laws of 1864 and 1866. *Clemens* v. *Conrad*, 19 Mich. 170 (1869); *Griffin* v. *Rauney*, 35 Conn. 239 (1868); *Latham* v. *Smith*, 45 Ill. 29 (1867); and is in accord with the construction already put upon the present law by the courts of two States. *Cassidy* v. *St. Germain*, 46 Atl. 35 (R. I., 1900); *Small* v. *Slocum*, 37 S. E. 481 (Ga., 1900).

TORTS—CIVIL ACTION FOR FELONY—DUTY TO PROSECUTE CRIMINAL. The plaintiff sued to recover damages for felonious assault. The defendant pleaded in abatement that an indictment for the felony was still pending and undetermined against him. *Held*, the plaintiff having made her complaint and appeared before the grand jury was entitled to maintain this action. *McBlain* v. *Edgar*, 48 Atl. 600 (N. J., Mar., 1901).

In England, an old rule of the common law precludes the institution of a civil suit against a defendant for a tort which is also a felony, until the plaintiff has prosecuted the criminal offense to conviction, acquittal or a termination of the criminal proceeding by some judicial act. *Stone* v. *Marsh*, 6 B. & C. 551 (1827). Though the American courts are unani-

mous in refusing to apply the full English doctrine, there is a wide diversity of opinion as to how far the principle should be carried. In some States the rule has been repudiated at common law; in others it has been abrogated by statute. One jurisdiction limits it to such felonies as are punishable capitally, another to offenses which were felonies at common law. Mr. BISHOP says that the true rule is believed to be that the party may institute the proceeding for damages as promptly as he chooses, only he must not bring on the trial in advance of his public duty. New Crim. Law, § 272.

TORTS—DEATH OF A MINOR—RIGHT OF ACTION. *Held*, "no action at common law by a father lies for the instantaneous death of a minor son." *Bligh* v. *Biddeford & S. R. Co.*, 48 Atl. 112 (Me. Jan. 1901). The case is a good illustration of the barbarous rule of the common law that *actio personalis moritur cum persona*. Statutes similar to Lord Campbell's Act (9 and 10 Vict. c. 29), which modified the rule in England, and allows a recovery in a case like that above, have been passed in most of our States; but in the absence of statute, or in such a case as the present where the action is not brought under the statute passed, the common law rule still prevails. "*The Harrisburg*," 119 U. S. 199 (1886); *Moran* v. *Hollings*, 125 Mass. 93 (1878); *Goodsell* v. *Hartford & N. H. R. R.*, 33 Conn. 51 (1865). *Ford* v. *Munroe*, 20 Wend. 210 (1838), which is cited as holding the contrary, was practically overruled by the N. Y. Court of Appeals in *Green* v. *Hudson River R. R. Co.*, 2 Keyes, 294 (N. Y., 1866).

TORTS—MASTER AND SERVANT—FELLOW-SERVANTS. Through the negligence of railway company's section foreman in performing his duty, which was to control the brakes of a hand car for the transportation of section hands, the plaintiff, a section hand, was thrown from the car and injured. *Held*, the railway company was liable, on the ground that the foreman was not a fellow-servant, but a vice-principal. *Ill. Cent. Ry. Co.* v. *Josey's Adm'x*, 61 S. W. 703 (Ky. Nov. 1900).

The exact relation existing between the railway company and the foreman is not clearly stated. But assuming that it was that ordinarily existing between such parties, the decision is against the great weight of authority. *Lochbaum* v. *Oregon Ry. & Nav. Co.*, 104 F. R. 852 (Wash. 1900) and *Railroad Co.* v. *Gaun*, 47 S. W. (Tenn., 1898) are, as to their facts, on all fours with the principal case and both are *contra*.

The Court was evidently misled by the fact that the foreman was the superior of the section hand; but, in the absence of evidence showing that the foreman was a direct representative of the railway company in performing the act which occasioned the injury, this fact was immaterial. *Crispin* v. *Babbitt*, 81 N. Y. 576 (1880): *Rodgers* v. *Ludlow Mfg. Co.*, 144 Mass. 198 (1887); Pollock on Torts (N. Y., 1895), 67; Cooley on Torts (Chicago, 1880), 542-545.

TORTS—NEGLIGENCE—PASSENGER ELEVATORS—RES IPSA LOQUITUR. Plaintiff's intestate was killed by the fall of a passenger elevator in which he was riding. *Held*, the jury might infer negligence from the fact of the accident and the attendant circumstances, and that defendant, who owned the elevator, was bound to use a degree of care commensurate with the dangerous character of the service. *Griffin* v. *Manice*, 59 N. E. 925 (N. Y., 1901). SEE NOTES, p. 399.

TORTS—NEGLIGENCE—FREIGHT ELEVATORS—RES IPSA LOQUITUR. Plaintiff was injured by the fall of a freight elevator in which he was riding. *Held*, A presumption of negligence arose from the fact of the accident, and that defendant was bound to a carrier's liability in respect to the apparatus employed. *Springer* v. *Ford*, 59 N. E. 953 (Ill., 1901). SEE NOTES, p. 399.

TORTS—MASTER AND SERVANT—MEASURE OF DAMAGES. Plaintiff was injured through his employer's negligence; *Held*, evidence as to the size of the plaintiff's family and their dependence on him was admissible as tending to prove loss of capacity to meet obligations imposed upon

him by law. *Youngblood* v. *South Carolina & G. R. Co.*, 38 S. E. 232 (S. C., March, 1901).

Two cases are cited by the Court as authority for this decision—*Johns* v. *Railroad Co.*, 17 S. E., 698, and *Maltus* v. *Railroad Co.*, 31 S. E. 240. Neither of these cases, however, is in point. In the former the Court denied an exception based on the admission of similar evidence, on the ground that in that particular case it was wholly immaterial and could not have influenced the verdict. In the latter case a similar exception was overruled because the defendant company had itself introduced evidence on the same point in cross-examination.

If there is little authority for this ruling in law it would seem that there is still less reason for it in principle. The necessary decrease in the plaintiff's earning capacity is the correct measure of damages in such cases, *Rooney* v. *Railroad Co.*, 53 N. E. 435,—not, as the principle case seems to indicate, the probable amount of his expenditures.

TRUSTS—CHARITABLE BEQUESTS IN NEW YORK—LAWS OF 1893. *Held*, by a referee, that a bequest of one thousand dollars "For the Poor of New York" is a charitable fund to be used for the benefit of the poor. It is not void for indefiniteness of beneficiaries, is not within the rule against perpetuities, and is to be administered by the Supreme Court. No appeal was taken. *Racine* v. *Gillet*, N. Y. Law Journal (N. Y. Supr. Ct., March 30, 1901). SEE NOTES, p. 400.

TRUSTS—RIGHTS OF CREDITORS UNDER "SPENDTHRIFT'S" TRUSTS. Defendants as trustees were under the duty of applying the income of the trust estate to the support of the beneficiary, having great discretion as to the amount to be so applied and the investment of the surplus. *Held*, they were liable to the extent of the income, for necessary medical services rendered by the plaintiff to the beneficiary at his request. *Sherman* v. *Skuse et al.*, 59 N. E. 990 (N. Y., March, 1901).

It is well settled that the maker of a spendthrift trust may, either by terms or by implication, prevent creditors of the beneficiary from acquiring any right against the *res* in satisfaction of their claims. *Seymour* v. *McAvoy*, 53 P. R. 946. The Court recognizes this rule and expressly disclaims any intention of overriding it. The decision is based on the peculiar state of facts in the present case. The plaintiff's claim was undoubtedly meritorious. There was no explicit finding that the trustees had themselves furnished proper medical attendance, and this, by the terms of the trust, they were bound to do. The Court seized upon the maxim, "Equity looks upon that as done which should be done," and considered the services as necessaries furnished to the beneficiary with the trustees' consent. While justice was undoubtedly done, the case may be viewed with suspicion, as lending itself too readily to improper citation.

WILLS—PRESENCE OF WITNESSES. Witnesses signed in an adjoining room, but the testatrix could have seen them by rising in bed, and was conscious of all that was said and done, though she was unable to raise herself. *Held*, the witnesses subscribed in her presence. *Raymond* v. *Wagner*, 59 N. E. 811 (Mass., March, 1901).

Mr. JARMAN, in his treatise on the law of wills, at page 89 declares such a subscription invalid, but cites only one case. The opinions in *Downie's Will*, 42 Wis. 66 (1877) and in *Chase* v. *Kittredge*, 11 Allen 61 (Mass., 1865), show that those courts held the same view, though those cases are distinguishable from the principal case. American authorities are hopelessly at variance, as shown by a note to *Mandeville* v. *Parker*, 31 N. J. Eq. 242 (1879). In *Cunningham* v. *Cunningham*, 83 N. W. 58 (Minn., 1900), and *Hopkins* v. *Hopkins*, 45 Atl. 551 (R. I. 1900), the testator could have seen, but did not, and the subscription was held valid. *Riggs* v. *Riggs*, 135 Mass. 238 (1883), and *Cook* v. *Manchester*, 46 N. W. 106 (Mich., 1890), distinguishing *Aiken* v. *Weckerly*, 19 Mich. 482 (1870), are strictly in accord with the principal case. Ordinarily the ability to see witnesses is the best test of their presence, but it would not be applicable in case of a blind testator. This is a similar case. But for a physical infirmity the testatrix could have seen what took place and a reasonable application is given to the statutes.